

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

NO. 75-4186

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

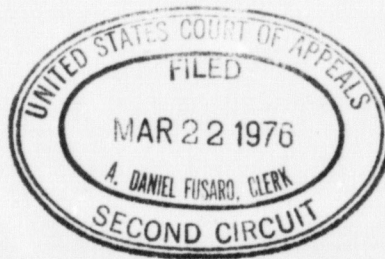
TWO WHEEL CORP., d/b/a HONDA OF MINEOLA,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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The Company is apparently of the view that the Court will decide this case *de novo* (e.g., Br. 1)¹ and that the standard of review is "preponderance of the credible evidence adduced at the hearing" (Br. 9). The correct standard of review is set forth at p. 7 of our main brief. The Company also repeatedly relies upon discredited evidence. Consequently, the Company's assertions of fact are often diametrical to the facts recited in our main brief. It will serve no purpose to reargue those facts. Accordingly, in this reply brief, we will respond only to factual assertions that have not been dealt with in our main brief.

¹ "A." references are to the printed appendix filed herein. "S.A." references are to the Supplemental Appendix, *infra*, pp. S.A. 1-S.A. 3. Whenever a semicolon appears in a series of references, the references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

The Company asserts (Br. 7) that the "affected employees were terminated in accordance with seniority." This statement is supported only by Zegarek's testimony (A. 154), which conflicts with stipulated evidence as to the number of employees and their hiring dates. The record establishes that nine unit employees kept their jobs after September 1.² Of these nine, only three (Ruppel, Baldasara and Steindel) are identified in the record and six are not. Two of the three (Ruppel and Baldasara) were kept on even though employees with more seniority in the same departments were laid off.³ The Company did not attempt to establish that Steindel or any of the unidentified six employees had more seniority than those laid off even though the burden was upon the Company to do so after the General Counsel established a *prima facie* case of discrimination. See *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26, 34 (1967). The Company's reliance on "weak [uncorroborated testimonial] evidence when strong [documentary evidence] is available can lead only to the conclusion that the strong would have been adverse." *Interstate Circuit v. U.S.*, 306 U.S. 208, 226 (1939), cited in *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 183, n. 5 (1973); *N.L.R.B. v. APW Products Co.*, 316 F.2d 899, 903 (C.A. 2, 1963).

² Excluding the Zegareks, supervisors and temporary employees, 16 employees were in the original unit (Main Br. 17-18). Seven of those employees (Musano, Lilker, Siegfried, Dodge, Dyroff, Kocivar and Ardito) were discharged. Thus, nine employees remained in the unit.

³ Ruppel and Ardito both worked in the parts department (A. 108, 178). Ruppel had 5½ months seniority (A. 108, 60) and was junior to Ardito, who had 8 months seniority (A. 60). Ruppel, however, was kept on and Ardito was laid off. Baldasara worked in the service department (S.A. 1) as did Liiker (Main Br. 11). Baldasara, with less than a month's seniority (S.A. 2), was junior to Lilker, who had worked for four months (A. 60). Baldsara, however, was kept on and Lilker was laid off.

The Company asserts (Br. 10) that employee Lilker "is credited with admitting that at the time of Musano's discharge that Zegarek had no knowledge of Musano's Union Activity." The Company's citation (A. 121) is not a reference to Lilker's testimony, but to the testimony of Company attorney Isaccson, who stated "I believe it was Mr. Lilker who indicated that . . . Mr. Zegarek had no knowledge" Lilker, however, testified that he merely said that he did not tell Zegarek anything about the Union, and further testified that he said nothing to Zegarek about the latter's knowledge of the Union at the time of Musano's discharge (S.A. 3). In any event, Lilker was not even present when Musano discussed the Union in front of a Company supervisor (Main Brief 3, S.A. 2).

The Company suggests (Br. 13) that employee Ardito worked only in the Warranty Department and that "his services were no longer needed" after that department was assertedly closed. Zegarek's own testimony establishes, however, that the Company continued to do warranty work, and his further testimony that this work was "handled" in "the office . . . as a bookkeeping procedure" after his discharge scarcely shows that Ardito's services were no longer needed (A. 152). Moreover, the record shows that Ardito also did non-warranty work in the parts department and that this work was performed after Ardito's discharge by a new employee. (see Main Br. 11).

The Company implies (Br. 22) that Zegarek offered Lilker the Veteran's Administration Program job at the time of his discharge. Zegarek admitted, however, that the offer was not made contemporaneous with Lilker's discharge, but thirty days earlier, when Lilker was still working for the Company and long before the union activities began (A. 166). Nor does the record support the Company's claim that filling a job with a V.A.-eligible employee was a matter of importance to it, for although Baldasara was eligible under the V.A. program, he never actually started the program (S.A. 1)

In addition, as we show (main Br. 12), the Company advertised for "V.A. approved or non-V.A. approved" applicants after the layoffs. In short, the Company's contention that it would have retained Lilker had he been V.A.-eligible is plainly without merit, and the Board properly found that the real reason he was fired along with the others was because he supported the Union.

The Company does not dispute the Board's findings that there are 16 employees in the unit (Br. 24) but does assert that Kocivar was a supervisor and that his card should not have been counted towards the Union's 9/16 majority (Br. 25). It also contends that lacking Kocivar's card, the Union does not represent a majority of the employees (Br. 25, 26). The Company's computations are incorrect because if Kocivar were a statutory supervisor, then he would be stricken from the unit, which would be contracted to 15, and the Union would, therefore, retain an 8/15 majority.

CONCLUSION

For the reasons stated herein and in the Board's opening brief, it is respectfully submitted that the Board's order should be enforced in full.

Respectfully submitted.

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SUPPLEMENTAL APPENDIX

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

* * * * *

31

RICHARD SHIRK,

called as a witness, having been first duly sworn in by Judge Welles, was examined and testified as follows:

DIRECT EXAMINATION

Q. (By Miss Johnson)

* * * * *

51

Q. Did you go to the meeting? A. Yes, I did.

* * * * *

132

DAVID PAUL BALDASARRA

was called as a witness, and being first duly sworn in by Administrative Law Judge Melvis Welles, was examined and testified upon his oath as follows:

DIRECT EXAMINATION

Q. (By Ms. Johnson) Did you formerly work at Honda, Mineola?

A. Yes.

* * * * *

133

Q. What was your position? A. I worked in service.

* * * * *

137

Q. Was your pay set differently in the veterans program than it would have been otherwise, if you know? A. I don't know. The program, the veterans program—

Q. Tell us about the program. A. I was going to start it, but I never did.

Q. You never started the program? A. It didn't go, yes.

MS. JOHNSON: No further questions.

RECROSS EXAMINATION

Q. (By Mr. Pollack)

* * * * *

138 Q. Do you know when you were hired? A It was August 14th.
* * * *

223 GLENN MUSANO
* * * *

236 Q. When did this take place, if you recall, this conversation?
A. Oh, I would say three weeks before I was fired. Somewhere around
that general vicinity.
* * * *

238 CROSS EXAMINATION

Q. (By Mr. Pollack) Now, you testified about a discussion with
some of your fellow employees which you -- which concerned the union,
which you say Harry overheard.

Do you recall that -- I am sorry, which you claim Ted overheard.
A. Yes, that's right.
* * * *

240 Q. Could you tell us who was there? A. Who was there during
that lunch time?

Q. Right. A. Oh, there was around five or six people there.
I know Bob Moraglio was there. I don't think Stu -- no, Stu was
not there. Dario was there, I think.

I am almost sure that Dave Kocivar was there, but I couldn't be cer-
tain of any of these.

There was a lot of people there, all of them were employees except
Ted.

* * * *

324 STEWART LILKER

* * * *

371 REDIRECT EXAMINATION

BY MS. JOHNSON:
* * * *

Q. Okay.

Now, with respect to the discussions at the meeting on August 28th of the union, did you say — what did you say with respect to Mr. Zegarek's knowledge or lack of knowledge of the union, or what were you asked about it?

A. Mr. Zegarek asked me if I had — Mr. Zegarek said, "Stu, have you ever said anything to me about the union?"

I said, "No, I haven't."

Q. Did you have any other — did you make any other remarks about his knowledge of the union during that period of time, during that meeting?

A. No.

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OF MINEOLA,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed reply brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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Dated at Washington, D. C.
this 19th day of March, 1976.